How Yew Hock (Executor of the estate of Yee Sow Thoo, deceased) v Lembaga Kumpulan Wang Simpanan Pekerja

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL 02-372 OF 1994
CHONG SIEW FAI CJ (SABAH & SARAWAK), PEH SWEE CHIN AND MOHAMED DZAIDDIN FCJJ
30 MAY 1996

Provident Fund *— Nomination — Contributor nominated daughter to receive amount standing to her credit in Employees Provident Fund under reg 9 of Employees Provident Fund Regulations 1969 — Contributor passed away — Whether nomination a testamentary document which must comply with Wills Act 1956 — Employees Provident Fund Act 1951 s 20 — Employees Provident Fund Regulations 1969 reg 9 — Wills Act 1956*

Succession *— Probate — Testamentary document — Contributor nominated daughter to receive amount standing to her credit in Employees Provident Fund under reg 9 of Employees Provident Fund Regulations 1969 — Whether nomination amounted to testamentary document — Whether compliance with Wills Act 1956 necessary — Employees Provident Fund Act 1951 s 20 — Employees Provident Fund Regulations 1969 reg 9 — Wills Act 1956*

In 1986, a Mdm Yee Sow Thoo ('the deceased') made a will appointing her son ('the appellant') to be the executor and trustee of her will. Subsequently, the deceased made a nomination ('the nomination') in Form KWSP–4 under the Employees Provident Fund Regulations 1969 ('the EPF Regulations'), nominating her daughter to receive the amount standing to her credit in the Employees Provident Fund ('EPF'). The deceased passed away in 1987. In 1991, the appellant was granted probate of the will by the High Court. The appellant then instituted an action at the High Court by way of originating summons seeking a declaration that the EPF nomination in favour of the deceased's daughter was null and void and that the will should take precedence. It was argued that the disposition of the deceased's property under reg 9 of the EPF Regulations, which amounted to a form of testamentary disposition of the deceased's property, did not comply with the provisions of the Wills Act 1959 ('the Wills Act') in this case. In reply, counsel for the respondent submitted that the Wills Act did not apply in this case, and therefore could not invalidate the EPF nomination which was made in the prescribed form under reg 9 of the EPF Regulations. The judge dismissed the appellant's application. The appellant appealed. The primary issue in this appeal was whether the nomination under the EPF Regulations was a testamentary document which must comply with the provisions of the Wills Act 1959.

Held, appeal dismissed:

(1) A nomination has certain testamentary characteristics. However, there is a vast difference between a testamentary paper and a disposition of a testamentary nature. A testamentary paper must satisfy the Wills Act, but a disposition might have certain testamentary characteristics without the paper containing it being a testamentary paper (see pp 478D and 481A–B).

(2) The nomination was a statutory nomination, which operated by force of the Employees Provident Fund Act 1951 ('the EPF Act') and Regulations. Section 20 of the EPF Act empowers the Minister of Finance to make regulations to provide for the nomination by a member of the EPF of the persons to whom any amount standing to his credit in the EPF at the time of his death is to be paid at his death. By virtue of this section, the EPF Regulations came into force, and the power to make nominations by a contributor of the EPF was provided for under reg 9. The nomination to be valid must be made in writing on the prescribed form (Form KWSP–4) signed by the nominator whose signature must be attested by a witness. It was not disputed that the nomination in this case had complied with the aforesaid provisions, and was therefore valid (see p 481B–D).

(3) The contention that the disposition of the deceased's property under the EPF Regulations was invalid as it was inconsistent with the Wills Act was devoid of any merit, in view of the court's opinion on the primary point that the nomination of the deceased was not a testamentary document and that it had complied with the provisions of reg 9 of the EPF Regulations (see p 481E).

[Bahasa Malaysia summary

Pada tahun 1986, puan Yee Sow Thoo ('si mati') telah membuat suatu wasiat melantik anak lelakinya ('perayu') untuk menjadi wasi dan pemegang amanah kepada wasiatnya. Selepas itu, si mati membuat penamaan ('penamaan itu') di dalam Borang KWSP-4 di bawah Peraturan-Peraturan Kumpulan Wang Simpanan Pekerja1969 (Peraturan-Peraturan KWSP), menamakan anak perempuannya untuk menerima amaun yang ada pada kreditnya dalam Kumpulan Wang Simpanan Pekerja ('KWSP'). Si mati meninggal dunia pada tahun 1987. Pada tahun 1991, perayu telah diberi probet wasiat itu oleh Mahkamah Tinggi. Perayu kemudiannya mengambil tindakan di Mahkamah Tinggi dengan cara saman pemula untuk mendapatkan deklarasi bahawa penamaan KWSP untuk faedah anak perempuan si mati adalah batal dan tak sah dan bahawa wasiat itu sepatutnya diberi pendahuluan. Adalah dihujahkan bahawa pelupusan harta si mati di bawah peraturan 9 Peraturan-Peraturan KWSP, yang menjadi suatu bentuk pelupusan perwasiatan harta si mati, tidak mematuhi pruntukan-peruntukan Akta Wasiat 1959 ('Akta Wasiat') di dalam

kes ini. Sebagai jawapan, peguam responden menghujahkan bahawa Akta Wasiat tidak terpakai di dalam kes ini, dan oleh itu tidak boleh mentaksahkan penamaan KWSP itu yang dibuat di dalam borang yang ditetapkan di bawah peraturan 9 Peraturan-Peraturan KWSP. Hakim telah menolak permohonan perayu. Perayu telah membuat rayuan. Isu yang penting di dalam rayuan ini ialah samada penamaan di bawah Peraturan-Peraturan KWSP adalah satu dokumen perwasiatan yang mesti mematuhi peruntukan-peruntukan Akta Wasiat 1959.

Diputuskan, menolak rayuan itu:

(1) Penamaan mempunyai beberapa ciri-ciri perwasiatan. Bagaimanapun, ada perbezaan yang besar di antara kertas perwasiatan dan pelupusan dalam bentuk perwasiatan. Kertas perwasiatan mesti mematuhi Akta Wasiat, tetapi pelupusan mungkin mempunyai beberapa karekteria perwasiatan tanpa kertas yang mengandunginya menjadi kertas perwasiatan (lihat ms 478D dan 481A–B).

(2) Penamaan itu adalah penamaan statutori yang dibuat di bawah kuatkuasa Akta Kumpulan Simpanan Wang Pekerja 1951('Akta KWSP') dan Peraturan-Peraturan. Seksyen 20 Akta KWSP memberi kuasa kepada Menteri Kewangan untuk membuat peraturan-peraturan untuk mengadakan peruntukan bagi penamaan oleh ahli KWSP akan orang-orang yang kepada mereka apa-apa amaun yang berada pada kreditnya dalam KWSP pada masa kematiannya hendaklah dibayar setelah kematiannya. Berdasarkan seksyen ini, Peraturan-Peraturan KWSP berkuatkuasa dan kuasa untuk membuat penamaan oleh ahli yang mencarum di dalam KWSP ada diperuntukkan di bawah peraturan 9. Penamaan itu, untuk menjadi sah, mesti dibuat secara bertulis di dalam borang yang ditetapkan (Borang KWSP-4) dengan ditandatangani oleh penama di mana tandatangan itu perlu diakusaksi oleh saksi. Adalah tidak dipertikaikan bahawa penamaan di dalam kes ini telah mematuhi peruntukan-peruntukan yang dinyatakan sebelum ini, dan oleh itu ia adalah sah (lihat ms 481B–D)

(3) Alasan bahawa pelupusan harta si mati di bawah Peraturan-Peraturan KWSP adalah tidak sah kerana ia tidak konsisten dengan Akta Wasiat tidak mempunyai apa-apa merit, memandangkan pendapat mahkamah di atas isu utama bahawa penamaan si mati bukan dokumen perwasiatan dan bahawa ia telah mematuhi peruntukan-peruntukan peraturan 9 Peraturan-Peraturan KWSP (lihat ms 481E).]

Notes

For cases on providend funds, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1351–1380.

For cases on succession, see 11 *Mallal's Digest* (4th Ed) paras 1427–1918.

A **Cases referred to**

Barnes, Ashenden v Heath, Re [1940] Ch 267
Danish Bacon Co Ltd Staff Pension Fund Christensen & Ors v Arnett & Ors, Re [1971] 1 All ER 486
Luvinia Baird v Dickson Baird [1990] 2 AC 548

B **Legislation referred to**

Employees Provident Fund Act 1951 s 20(b)
Employees Provident Fund Regulations 1969 reg 9
Wills Act 1959

C **Appeal from**: Civil Suit No D2–22–2012–1989 (High Court, Kuala Lumpur)

Chan Kok Keong (Ng Sow Han with him) *(Chan & Associates)* for the
D appellant.
Mohd Naim bin Daruwish (Jamal Nassir bin Abdul Ghani with him) *Jabatan Undang-Undang, Bhg Pendakwaan/Litigasi, Lembaga Kumpulan Wang Simpanan Pekerja)* for the respondent.

E **Mohamed Dzaiddin FCJ** (delivering the judgment of the court): The genesis of this appeal was a will made by Yee Sow Thoo @ Chor Siew Tho (f), deceased, dated 1 August 1986, appointing her son, the appellant, the executor and trustee of the will, and a subsequent nomination of the deceased made in Form KWSP–4 under the Employees Provident Fund Regulations 1969 ('EPF Regulations'), nominating her daughter, Chong
F Hui Lee to receive the amount standing to her credit in the Employees Provident Fund ('EPF'). Then, on 13 February 1987, the deceased passed away. On 10 September 1991, the appellant was granted probate of the said will by Ipoh High Court vide Ipoh High Court Probate Petition No 32–191–91.

G On 20 December 1991, the appellant instituted an action at Ipoh High Court by way of Originating Summons No 24–1050–1991 seeking a declaration that the EPF nomination in favour of the deceased's daughter was null and void on the ground that the nomination did not comply with the provisions of the Wills Act 1959, and that the will should take
H precedence. On 6 June 1996, the learned judge dismissed his application with costs.

Both here and in the court below, the primary contention of Encik Chan was that the EPF nomination was a form of testamentary disposition of the deceased's property, which document must comply with the
I provisions of the Wills Act 1959. On that premise, counsel contended that the disposition of the property of the deceased under reg 9 of the EPF Regulations was inconsistent with the Wills Act 1959. In the result, the said nomination was null and void and that the will dated 1 August 1986 should take precedence.

In reply, Encik Mohd Naim submitted that the said EPF nomination was a valid nomination. It was made under regulations provided for under s 20(b) of the Employees Provident Fund Act 1951. The section gave the Minister of Finance power to make regulations to provide for the nomination by a member of the Fund of the person to whom any amount standing to his credit in the Fund at the time of his death was to be paid at his death. Thus, the said nomination was made in prescribed form under reg 9 of the EPF Regulations which was duly registered and retained for safe-keeping by the Employees Provident Fund Board. Encik Naim concluded by stating that the Wills Act 1959 did not apply, and therefore could not invalidate the said nomination.

On 6 May 1996, we dismissed this appeal and now give our reasons.

The primary issue in this appeal was whether the said nomination under the EPF Regulations was a testamentary document which must comply with the provisions of the Wills Act 1959. Based on the authorities referred to us by counsel, we had no hesitation in coming to our conclusion that the said nomination was not a testamentary document, although possessing certain characteristics of a will, in particular it is ambulatory until the death of the nominator. Encik Chan was at pain to persuade us to accept his contention that the said nomination was a testamentary disposition and therefore it had to comply with the provisions of the Wills Act 1959. He referred us to *Danish Bacon Co Ltd Staff Pension Fund Christensen & Ors v Arnett & Ors, Re* [1971] 1 All ER 486 and *Luvinia Baird v Dickson Baird* [1990] 2 AC 548.

According to *The Law of Succession* (4th Ed) by Anthony R Mellows (at p 10):

> A nomination is a direction to a person who holds funds on behalf of another to pay those funds in the event of death to a nominated person. In many cases, nominations operate by statute ... However, there can also be non-statutory nominations, particularly in connection with pension schemes. The rules of many pension schemes provide, in essence, that if the employee dies during the course of his employment the amount of his contributions will be paid to a person nominated by the employee in writing, and in the absence of any nomination, to the employee's personal representatives. Where a nomination is made, it does not operate as a will. While the documents does affect the devolution of property on death, the property passes directly from the fund to the nominee, and at no time forms part of the estate. The nomination operates by virtue of the rules of the scheme, and not as a will, and it does not, therefore, have to satisfy the requirements of the Wills Act.

In *Re Barnes, Ashenden v Heath* [1940] Ch 267 at p 273, Farwell J described a nomination as having the characteristics of a testamentary document. This is what he said:

> I say 'in its nature testamentary', because it has all the characteristics of a testamentary document, that is to say, it is a nomination which has no effect at all until the death of the nominator who is left completely free during his

> lifetime to deal with his share irrespective of it. The nominee would have no right to complain of, nor could he take any steps to prevent, the nominator dealing with his interest during his lifetime. The nomination has no operation and is not intended to have any operation until the death of the nominator. Whether or not it then operates depends upon whether or not the nominator has during his lifetime either revoked it or used the money which he purported to nominate for his own purposes, by withdrawing it from the society or in some other way. The result, as I said, is that the nature of the nomination in a case of this sort is clearly testamentary.

The above passage was referred to by Megarry J in *Re Danish Bacon Staff Pension Fund* which was concerned with a nomination of a staff pension fund under a trust deed, where the rules of a staff pension fund provided for the payment to a member who had left the company's service without becoming entitled to a pension under the rules or to the personal representatives of the member who died in service of the amount of his contributions together with compound interest. One of the rules of the fund provided that the member might, and must if required by the trustees, appoint a beneficiary to receive that which would otherwise become due to his personal representatives on his death in service. One issue raised by the proceeding was whether a nomination signed in the presence of a single witness was effective or whether it was a testamentary disposition which required to be attested in the same way as a will. Megarry J held that the nomination was effective. In describing the member's interest, he observed, at p 493:

> What I am concerned with is a transaction whereby the deceased dealt with something which ex hypothesi could never be his. He was not disposing of his pension, nor of his right to the contributions and interest if he left the company's service. He was dealing merely with a state of affairs that would arise if he died while in the company's pensionable service, or after he had left it without becoming entitled to a pension. If he did this, then the contributions and interest would, by force of the rules, go either to his nominee, if he had made a valid nomination, or to his personal representatives, if he had not. If he made a nomination, it was revocable at any time before his death.

In summarizing counsel's argument and stating his conclusions on this point, the judge continued at pp 493–494:

> First, although a nomination had certain testamentary characteristics, and not least that of being ambulatory, it took effect as a contractual arrangement and not as a disposition by the deceased. The contributions and interest did not come to the deceased and then pass on from him by force of his will or the nomination; they went directly from the fund to the nominee, and formed no part of the estate of the deceased. I may say that I think *Bennett v Slater & Anor* [1899] 1 QB 45 and *Eccles Provident Industrial Co-operative Society Ltd v Griffiths* [1912] AC 483, 490 provide some support for this view. Despite certain testamentary characteristics, the nomination takes effect under the trust deed and rules, and the nominee in no way claims through the deceased. Secondly, there is a vast difference, it was said,

between a testamentary paper and a disposition of a testamentary nature. A testamentary paper must satisfy the Wills Act 1837; but a disposition might have certain testamentary characteristics without the paper containing it being a testamentary paper. Indeed, Mr Godfrey urged that a nomination was sui generis, with some of the characteristics of an appointment under a power, some of the characteristics of a will, and some of the characteristics of a donatio mortis causa. As Alice said, curiouser and curiouser.

I appreciate the force of these arguments. Non-statutory nominations are odd creatures, and the cases provide little help on their nature. I do not, however, think that a nomination under the trust deed and rules in the present case requires execution as a will. It seems to me that such a nomination operates by force of the provisions of those rules, and not as a testamentary disposition by the deceased. Further, although the nomination has certain testamentary characteristics, I do not think that these suffice to make the paper on which it is written a testamentary paper. Accordingly, in my judgment the requirements of the Wills Act 1837 have no application.

In *Luvinia Baird v Dickson Baird* [1990] 2 AC 548, the Privy Council had to consider whether a nomination by a member of company pension scheme of a beneficiary to receive the death benefit payable under the scheme on the member's death before retirement constituted a testamentary disposition by the member and was thus invalid unless executed in accordance with the provisions of the Wills and Probate Ordinance of Trinidad and Tobago which followed the provisions of the English Wills Act 1837. The Board held that whether or not the statutory requirements relating to wills applied to a nomination of a beneficiary under a pension scheme depended on the provisions of the particular scheme, but that where a member's interests were non-assignable and approval for making or revoking a nomination was required, his nomination of a beneficiary to receive the benefit payable on his death before leaving that employment or retirement would not constitute a testamentary disposition. In so holding, Lord Oliver followed *Re Danish Bacon Staff Pension Fund* where his Lordship concluded (at p 561):

> The question must depend in each case on the provisions of the individual scheme. No doubt, where the effect of the particular scheme is, as it was in *Re MacInnes* [1935] 1 DLR 401, to confer upon a member a full power of disposition during his lifetime over the amount standing to his credit under the scheme, a disposition of that interest upon his death would normally constitute a testamentary disposition requiring attestation in accordance with the statutory requirements for the execution of a will. But in what is now the normal case of non-assignable interests such as that in the present case and, a fortiori, where the power of nomination and revocation requires the prior approval of the trustees or of a management committee, their Lordships see no reason to doubt the correctness of Megarry J's decision in the *Danish Bacon Co* case.

It should, perhaps, be noted that the above authorities dealt with non-statutory nominations under pension schemes which operate by virtue of the rules of the schemes. Nevertheless, the ratio which emerge from them,

in particular that a nomination has certain testamentary characteristics; that there is a vast difference between a testamentary paper and a disposition of a testamentary nature; and that a testamentary paper must satisfy the Wills Act, but a disposition might have certain testamentary characteristics without the paper containing it being a testamentary paper, are of general importance which we would respectfully adopt in arriving at our decision.

Therefore, in the instant case, it was obvious that the said nomination was a statutory nomination, which operated by force of the EPF Act 1951 and Regulations. Section 20 of the EPF Act 1951 empowers the Minister of Finance, after seeking the advice of the EPF Board, to make regulations to provide for the nomination by a member of the Fund of the persons to whom any amount standing to his credit in the Fund at the time of his death is to be paid at his death. Hence, by virtue of this section, the EPF Regulations came into force. The power to make nominations by a contributor of the Fund is provided for under reg 9. The nomination to be valid must be made in writing on the prescribed form (Form KWSP–4) signed by the nominator whose signature must be attested by a witness. The form was registered by the EPF Board on 30 October 1986 and retained for safe-keeping until after the deceased's death. In fact, it was not disputed that the said nomination had complied with the aforesaid provisions and was therefore valid.

Next, on the contention of Encik Chan that the disposition of the deceased's property under the EPF Regulations was invalid as it was inconsistent with the Wills Act 1959, we need only say that in view of our above opinion on the primary point that the said nomination of the deceased was not a testamentary document and that it has complied with the provisions of reg 9 of the EPF Regulations, we found his submission devoid of any merit.

For the above reasons, we dismissed the appeal and upheld the decision of the learned judge. We also ordered costs to the respondent to be taxed, if not agreed, and the deposit to be paid to the respondent to account of the costs.

Order accordingly.

Reported by Isabel Liong